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IN THE

Supreme Court of the United States

OCTOBER TERM—1936.

No. 19.

BAXTER N. FOUST, Administrator, Etc.,
Petitioner,

vs.

MUNSON STEAMSHIP LINES, Debtor in Reorganization,
Respondent.

—o—

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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AGAINST

MUNSON STEAMSHIP LINE, Debtor in Reorganization,
Respondent.

BRIEF FOR PETITIONER.

The Opinions of the Court Below.

There was no opinion by the district judge, but on January 20th, 1935, he entered the following memorandum:

> "The motion is denied with permission to go before a master and adjudicate the claim if the claimant so desires."

The Circuit Court of Appeals wrote two opinions. The first, called the "deferring opinion", was handed down on January 6th, 1936 (R., 47), and is reported in 80 Fed. (2d) 859.

The final opinion was handed down February 10th, 1936, (R., 53) and is reported in 82 Fed. (2d) 289.

Statement of the Case.

On February 1st, 1934, Foust, as administrator, brought suit against the Munson Steamship Line to recover indemnity under the provisions of the Jones Act for the death by wrongful act of Coy E. Foust, a merchant seaman, who lost his life on the American Steamship *Mundelta*. The action was brought for the benefit of the father of the deceased who suffered pecuniary loss by reason of his son's death.

The defendant duly answered on February 7, 1934, and the case was at issue and upon the calendar of the court awaiting its turn to be tried.

On June 11, 1934, which was some four months after this death action was commenced, and before the case could be reached in regular order for trial, the Munson Steamship Line filed its Petition for Reorganization under Section 77B, and on July 13th, 1934, it was adjudicated insolvent; trustees were appointed and a general restraining order granted, under and by the terms of which the prosecution of all pending actions was stayed.

It is noteworthy that in the petition for reorganization *not a single tort claim* was mentioned, nor was *a single action to recover damages for tort* named by the petitioner. Its recital of liabilities does not list a single claim arising *ex delicto* (R., 8-10). The only pending litigation mentioned in the petition is an action *ex contractu* brought in the Supreme Court of New York by the G. & B. Marine Repair Company (R., 11).

It may be that the omission of all tort claims or tort actions was due to the realization on the part of the petitioner that such claims were not provable or dischargeable in reorganization, or to the fact that the Debtor carried liability insurance to protect itself against personal injury and death claims, and that, therefore, such claims were the concern only of the insurance carrier.

However, no tort action, either threatened or pending, was mentioned in the petition, and we conclude that the

sweeping restraining order of the district court contemplated the restraint only of such actions as were recited or which might be commenced by any listed creditor and which might impede, embarrass or complicate the orderly proceedings incident to the reorganization.

Under the laws of the State of New York, all policies of liability insurance, issued or delivered in that state, must contain a provision that, in the event of the insolvency or bankruptcy of the insured, upon the return of an execution unsatisfied because of such insolvency or bankruptcy, then the judgment-tort-creditor may bring suit on the policy and recover, within the terms of the policy, the amount of the judgment not exceeding the face value of the policy. The following is the language of the statute:

> "No policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, * * *, and for which loss or damage the person insured is liable, shall be issued or delivered in this state by any corporation or other insurer authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy."
>
> New York Insurance Law, Section 109.

Foust was anxious to reduce his claim to judgment by trial in due course so that an execution might issue and

be returned unsatisfied because of the insolvency of the defendant, the Munson Steamship Line, and thereupon, by virtue of the said statute, to bring suit directly against the insurance company to recover on the judgment as fully as possible within the terms of the policy.

But he could not proceed with a trial because of the general restraining order in the reorganization proceedings and, not desiring to submit his claim for liquidation before a Special Master, moved the district court to grant an order modifying the general restraining order so as to permit Foust to try his pending case in the District Court with a view to obtaining a judgment, if possible (R., 20).

The modification prayed for was refused by Judge Alfred C. Coxe, who issued the original restraining order, but he provided that a Special Master would be appointed to determine the Foust claim, if desired (R., 26).

The claimant, Foust, did not want a Special Master. He felt that he had a legal right to a jury trial so he applied for and obtained leave to appeal to the Circuit Court of Appeals, but that Court refused to hear argument as to the right to a jury trial and restricted the question which it would hear, as follows:

> "The briefs and argument will not, therefore, touch the right of trial by jury of the claim in reorganization as to which leave is denied; it will be confined to whether the action can be stayed at all" (R., 37-38).

The briefs and argument in the Circuit Court of Appeals were therefore confined to the narrow and only question which the Court granted leave to present, but when the Court reached the consideration of the question, it realized that the restriction would have to be lifted and other questions entertained, and so, on January 6, 1936, the Court handed down what was called a "deferring decision". This decision held broadly that the power to restrain covered all kinds of actions; that tort claims were

dischargeable in reorganization and, were nothing else before the court, the Foust claim should proceed to liquidation before a Special Master. But the existence of the liability insurance policy and the said provisions of Section 109 of the Insurance Law injected a new element into the case, which required consideration. *The court recognized that a judgment against Munson Steamship Line was a condition precedent to recovery against the insurance company,* and that such judgment must be returned unsatisfied. The court correctly held that an order of the bankruptcy court or the award of a Special Master, liquidating the Foust claim, would not be the equivalent of a judgment because no execution could issue thereon, and therefore, no execution could be returned unsatisfied, and, consequently, this condition precedent to suit upon the insurance policy could not be performed.

The decision then continues (R., 51):

> "It would probably simplify matters to allow the action in the state court to proceed. If Foust should recover judgment in that action, the execution would be returned 'unsatisfied' and he then could proceed to collect the *whole claim* from the carrier by direct suit pursuant to Section 109. But it is common experience that jurors often return far larger verdicts in negligence actions than reason justifies. The trustees of the debtor have a perfect right to take this into account and not accede to a method for the liquidation of the tort claims that is unusual in bankruptcy unless the ordinary proof before a Special Master would imperil the claimant's rights." (Italics ours.)

We invite the court's attention to the fact that throughout the opinion of the Circuit Court nothing was said about any deductible clause in the insurance policy or any self-insurance by the Debtor under the terms of the policy, but on the contrary assumed—as necessarily it must have upon the record—that the judgment would have to

be *fully paid* by the insurance carrier. The court even conjectures about the possibility of a separate suit by the Munson Line against the insurance carrier to recover any dividend which might be paid to Foust from its assets, thereby showing that nothing about a deductible clause was in the mind of the court, nor presented either in argument or in the record, as of course it was not.

The Circuit Court then made this proposition to Foust:

> "If Foust is willing to stipulate not to use any judgment he may recover in the state action as a claim against the estate there could be no objection to allowing the action to proceed to judgment * * *. But if such stipulation is not filed by the appellant within three days, supplemental briefs shall be filed within ten days thereafter relating to the propriety of the exercise of the judicial discretion of the District Court, whereupon we shall determine whether the stay ought to stand in the absolute form in which it was granted."

For opinion in full see,

In re Munson S. S. Line, 80 Fed. (2) 859

Foust was thus presented with an awkward problem to solve. He could have his jury trial if he would stipulate not to file any claim based upon any judgment which he might obtain against the Debtor's estate, but he had three good and sufficient reasons for not so stipulating, and he set them forth in a supplemental brief as follows:

1. Foust was granted only limited letters of administration which restricted his authority to the mere prosecution of the action. He had no right to enter into such a stipulation.

2. Under the policy the Munson Line was self-insurer for the first $2,500.00 of any claim and, as the value of the Foust claim would probably not exceed $5,000.00, such

stipulation would mean that Foust would have to abandon a substantial part of his claim.

3 Under the terms of the policy the insurer became subrogated to all rights of insured and, if Foust should waive his right to collect *pro tanto* from the debtor, then such waiver might operate to entirely release the insurer.

There in that supplemental brief was the *first mention* of the $2,500.00 deductible. It was simply stated as a possible reason for not stipulating to file no claim against debtor based on any judgment obtained. It was no part of the record as made. It was not before Judge Coxe. It was not known to the Circuit Court of Appeals when it handed down its "deferring decision".

It was a statement *dehors* the record. It was made because we did know that in another case such a policy which was issued to Munson Line did have that deductible clause, and it was merely assumed that the present policy was similar in its conditions and terms. Neither Foust nor his attorney had ever seen the policy.

As a matter of fact we had always believed that the deductible provision of the policy was void as contrary to Section 109 of the Insurance Law, and we argued that proposition before the New York Court of Appeals last fall.

The "deferring decision" of the Circuit Court of Appeals was handed down on January 6, 1936. It was two days later, to wit, on January 8, 1936, that the Court of Appeals handed down its decision holding the deductible clause to be valid.

Sawyer v. *Am. Ins. Co.*, 269 N. Y. 148.

It was not until that decision was rendered that we knew that the deductible of $2,500.00 was a claim against Munson Steamship Line, and it was in that newly acquired knowledge that the deductible was assigned as one

of the reasons for not stipulating to waive any claim against the debtor.

We were somewhat surprised, therefore, when the Circuit Court of Appeals seized upon that deductible clause as a justification for the refusal of Judge Coxe to modify the restraining order when the existence of such a clause had never been brought to Judge Coxe's attention, and no mention was made of it in the opposition papers and affidavits on behalf of the Trustees. Such a reason was not assigned by Judge Coxe to justify his refusal to let the tort case proceed to trial and the decision of the Circuit Court has placed a fact into the record which was not there when Judge Coxe heard and passed upon the motion; was not there when leave to appeal was asked; was not there when the briefs were prepared nor when the case was argued. It was not there when the court, in its "deferring opinion" on January 6th, 1936, said (R., 50):

> "Now the condition of liability of the insurance company under the policy will only be fulfilled if a judgment is recovered by the claimant and an execution thereon is returned unsatisfied. It is somewhat doubtful whether an order of the bankruptcy court allowing Foust's claim would be the equivalent of the execution required by section 109 of the Insurance Law, for an execution never issues out of that court, at least in a literal sense. But, even if an order of the bankruptcy court allowing the claim could be said to be the equivalent of an execution, the question would arise whether Foust, after receiving from the Munson Steamship Line whatever dividend might be paid him under the plan of reorganization, would be able to recover the balance of his claim from the carrier to the extent that such balance, plus what he had received as a dividend, did not exceed the face of the policy. This would depend on whether the words 'returned unsatisfied' in section 109 not only means 'wholly' but also 'partially unsatisfied'. The latter meaning of 'unsatisfied' would subject the carrier to two actions, one by the insured Munson Line to recover

> the dividend paid and the other by Foust for any balance not in excess of the policy. It may be argued with some, though not altogether convincing, force that such twofold causes of action are not authorized by section 109. It would probably simplify matters to allow the action in the state court to proceed. If Foust should recover judgment in that action, the execution would be returned 'unsatisfied,' and he then could proceed to collect his whole claim from the carrier by direct suit pursuant to section 109."
>
> *In re Munson S. S. Line*, 80 Fed. (2d), at page 861.

The above language is a clear indication that the idea of a deductible clause was not then in the mind of the court.

Nevertheless, when Foust refused to abandon any claim against the debtor as the price for obtaining the right to a trial, which refusal was based upon good and sufficient legal reasons, the Circuit Court of Appeals denied him the permission to try his case in quest of a judgment which was a condition precedent to proceeding against the insurance carrier, and approved and affirmed Judge Coxe's refusal to modify the stay.

Specification of Errors.

1. Section 77B did not change the existing law that a tort claim or a tort judgment, obtained after adjudication, was not provable and not dischargeable, and, therefore, any action pending at the date of the adjudication or approval was entitled to proceed to trial, and to become liquidated by judgment, and the Circuit Court of Appeals erred in denying this tort action a jury trial whether or not the judgment, when obtained, would be provable or dischargeable.

2. The court erred in requiring the claimant, Foust, to stipulate that no claim based upon any judgment which

he might obtain if allowed to proceed to trial, would be used as the basis of any claim against the assets of the debtor in reorganization, because the insurance stood as a guaranty to Foust as a donee beneficiary under the policy, and once obtaining a judgment against the insured, he could then sue directly on the policy.

3. Because of the existence of the insurance policy, and by force of Section 109 of the New York Insurance Law, Foust had a right to proceed to obtain a judgment so that he could have it returned unsatisfied because of the insolvency of the judgment-debtor, and thereby put himself in a position to sue on the policy and collect from the insurance carrier, and it was a denial of due process of law to have deprived this tort claimant of so substantial a right as the collection of his judgment as authorized by the Insurance Law.

4. Assuming that the Foust claim is provable in bankruptcy, nevertheless the court should have allowed the claim to be reduced to judgment so that direct suit could be brought against the insurance company because, irrespective of Section 109 of the Insurance Law, Foust would, under the common law, be considered a donee beneficiary under the liability policy and the insurance carrier would be considered as a guarantor to Foust, and direct suit may be brought against the insurer. The restraining order in the reorganization proceedings should have been modified to allow this.

5. Whether or not the policy contains a deductible clause of $2,500.00 which is the personal liability of the debtor, is immaterial at this time. The provisions of the policy were never before either the district court or the Circuit Court of Appeals, and was brought to their attention only after the court had decided the questions presented in the record, and the Circuit Court erred in using

such deductible clause as a reason for justifying Judge Coxe in refusing to modify the restraining order because the decision should have been predicated *only upon the record as made.*

6. Foust, as administrator of a deceased seaman, suing under the Jones Act, had a legal right to a jury trial, and his suit should not have been stayed.

7. Seamen, by virtue of the Jones Act which gave them all rights of railroad employees, inherit the benefits to railroad employees given them under the Railroad Reorganization Act.

POINT ONE.

Section 77B did not change the old law under Section 63 of the Bankruptcy Act to the effect that tort judgments obtained after adjudication are not provable, and the prosecution of the pending action should not have been restrained.

Two things are quite clear. In the first place, under Section 63 of the Bankruptcy Act, tort judgments obtained *after* adjudication were not provable or dischargeable in bankruptcy.

Schall v. *Camors,* 251 U. S. 239.

In the second place, in equity receiverships prior to 77B, it was the recognized law that claims could be liquidated by trial if a mere personal judgment was sought.

> "There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which controls the *res.* It is only necessary that in the receivership proof of claim be made in an orderly

way so that it may be established who the creditors are and the amounts due them."

Reihl v. *Margolis*, 279 U. S., at page 224;
Langnes v. *Green*, 282 U. S. 531;
Chi. Title Co. v. *Fox Theatres*, 69 Fed. (2d) 60 (4);
Barton v. *Barbour*, 104 U. S. 126.

If the state court suit merely seeks judgment *in personam* and will not affect the property taken under the federal receivership, the two proceedings may go on concurrently.

Hatch v. *Holding Co.*, 19 Fed. (2d) 766; affirmed *Reihle* v. *Margolis*, 279 U. S. 218;
Kline v. *Burke Const. Co.*, 260 U. S. 226.

And if further citation be needed to establish the principle, we cite the recent expression of this court:

"Moreover, the bankruptcy court might, in the exercise of its discretion, conclude that it is desirable to have the litigation proceed in the state court."

Ex parte Baldwin, 291 U. S. 610.

Not only was this the law but it was the established practice, certainly in the Federal courts in New York, to vacate restraining orders in receiverships to permit tort claims to be tried at common law or in admiralty.

The *Matter of Wendell P. Colton Co.* v. *N. Y. & Cuba Mail Steamship Co.*, in the United States District Court for the Southern District of New York, was an equity receivership. Its index number is E-28236. In that case the customary general restraining order against the commencement or prosecution of suits was granted when the petition was filed. In that case numerous claimants, holding unliquidated claims for property damage, personal

injuries and other claims arising *ex delicto,* applied to the Court for a modification of the restraining order so as to permit suits to be brought or prosecuted so that judgments could be obtained. The record on file in the clerk's office discloses that numerous modifications were granted and actions were permitted to be prosecuted to judgment as well as granting authority to *"file libels in rem and to attach the vessel and to prosecute said suits to judgment and execution, if necessary."* That was not an instance where one judge granted all these orders of modification but, from time to time, they were granted by Judge Knox, Judge Winslow and Judge Goddard.

In the recent receivership of the Eighth and Ninth Avenue Railway Company, in the Southern District of New York, Index No. E 41,271, orders allowing pending tort actions to be prosecuted to judgment were frequently granted.

The practice of modifying restraining orders to allow tort actions to be tried had not been departed from in that district until Judge Coxe refused to modify his order in this Munson Steamship Line reorganization.

What changes, if any, were made in either the old law or the old practice by the Corporate Reorganization Act?

Since subdivision k of Section 77B (11 U. S. C. A. 207 k) expressly provides that Section 63 of the Bankruptcy Act is not applicable under 77B, we may eliminate Section 63 from consideration and look solely to 77B for any change in the prevailing equity practice of allowing trials to judgment.

It is noteworthy that the Congress saw fit to amend Section 63 so as to provide that, should reorganization *fail,* and liquidation should proceed *in bankruptcy,* then the amount of any damages shall be a provable claim when *"evidenced by the judgment of a court of competent jurisdiction."* (Italics ours.)

Title 11 U. S. C. A., Section 103 (6½).

It was, therefore, contemplated that in *bankruptcy* the amount of any damages was to be ascertained by trial, thus showing that a court trial was not abhorrent to the law makers.

We find no specific mention of procedure to liquidate a tort claim in the Corporate Reorganization Act. True it is that the definition of "creditors" was broadened and the definition of "claim" was enlarged, but we challenge the conclusion that these added generalities were sufficient to work so radical a change in the established law.

In Section 77B, (b), (10), Congress undertook to define "creditors" and "claims" as used in the Act, and said:

> "The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or his property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act."

The language "claims of whatever character" is certainly sweeping and all-embracing and, without more, might be interpreted as including tort claims. But Congress immediately proceeded to limit the broad expansiveness of "claims of whatever character" by a definition of "claims" as follows:

> "The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character."

It is apparent that the *debts* in contemplation were those arising *ex contractu* or from commercial transactions, and the context shows that tort claims were not in the same class or *genera* of "debts, securities * * * or other interests of whatever character."

Furthermore, after including under "creditors" all holders of "claims of whatever character" the Congress

deemed it necessary to step beyond this wide generalization by adding *"including claims under executory contracts" thereby confirming the thought that civil, contractual obligations were intended.*

Had the Congress intended to make so radical a change in the extant law as to *include* the theretofore *excluded* tort claims, would not the Act have added after "including claims under executory contracts" some positive, emphatic expression like "and tort or other claims arising *ex delicto*?"

And in defining "claims" to include "debts, securities • • • " would not the lawmakers have expressly said something like "debts, *tort or negligence claims for injury or death*, securities, etc.," if there had been the purpose to depart from long established law and practice and include tort claims?

And in providing for a final decree discharging the debtor from all "debts and liabilities" the word "liabilities" in the context manifestly refers to such as arise from obligations of a civil nature rather than those of tortious origin. Even that one word "liabilities" is not sufficient upon which to predicate an intention to include tort claims without some clear language evidencing such intention. It cannot be done by implication or supposition. Decisions which have been law for many years, and the statute law, cannot be changed or amended or repealed by hint or generalities.

Seems like the Act studiously avoided the mention of tort claims in reorganization for under Clause 6½ of Section 63 of the Bankruptcy Act it was expressly provided that if reorganization fails them tort claims may be evidenced by "a judgment of a court of competent jurisdiction." Its silence about tort claims in reorganization proceedings while providing for them if reorganization fails and liquidation in bankruptcy ensues, would seem to indicate a resolve to leave the existing law and practice in equity receiverships unchanged.

"Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract, express or implied, often require to be liquidated, some provision for procedure evidently was called for. Clause b fulfills this function, and would have to receive a strained interpretation in order that it should include claims arising purely *ex delicto*. Such claims might easily have been mentioned if intended to be included."

Schall v. *Camors*, 251 U. S. 251.

Evidently Congress did not trust the inclusiveness of its general definition of "creditors" or "claims" or "liabilities" when it came to future rents and expressly mentioned such claims as provable. Its failure to expressly name claims for personal injuries or death by wrongful act seemingly would indicate an intention not to make such claims provable. Congress evidently intended to let the old practice under equity receiverships stand.

We contend, therefore, that 77B has left tort claims to be reduced to judgment by trial, and that such judgment, obtained *after* approval of the petition, is not provable.

This conclusion is not without authority to support it:

"Assuming that the court should direct in some manner the liquidation of unliquidated claims, then there is no reason why the court should not follow the established practice of permitting same to be done in a state court. Particularly is this true where a suit has already been instituted and is now pending."

In re Missouri Gas & Electric Service Co., 11 Fed. Supp. 434.

"The claimant who insists upon his constitutional right to a jury trial would do well to reflect that while the court may not be empowered to deprive him of that right, it can control the time for the

presentation and allowance of claims and the application of the debtor's property thereto * * *. These considerations yield the view that, while a tort claimant may not be stayed from liquidating his claim in a state court action, expediency will ordinarily divert him from that course."

In re James Butler Grocery Co., 12 Fed. Supp. 853.

See:

Chicago T. & T. Co. v. *Fox*, 69 Fed. (2d) 60;
In re Sentinel Oil Co., 12 Fed. Supp. 294.

It would seem that Congress, if intending to radically change existing law and practice, would have been attentive to employ language and words which would be free from doubt.

The term "creditors" was thrice defined by Congress in its legislation for the relief of individual, corporate and railroad debtors.

As to the individual the definition was "all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this title".

Title 11, U. S. C. A., Section 202.

There Congress distrusted its general language "claims of whatever character" as covering all possible claims and expressly inserted "a claim for future rent", well knowing that under prior law such claims were ordinarily not provable.

As to railroads, after using the identical language of said Section 202 as to "claims of whatever character", made sure that "rents under an unexpired lease" be included by expressly mentioning such claims.

Title 11, U. S. C. A., Section 205 (b).

But the Corporate Reorganization Act (Sec. 77B) followed the above definition of creditors as to individuals and railroads but never expressly mentioned claims for future rent or rents under unexpired leases, but doubtless included them under "executory contracts".

If "claims of whatever character" was not embracing enough to include "future rents" or "rents under an unexpired lease" or "claims under executory contracts", why would such general phrase include tort judgments obtained after adjudication? We contend that it does not.

POINT TWO.

The court erred in requiring Foust, as a condition precedent to obtaining the right to a trial, to stipulate that no part of any judgment obtained would be used as the basis of any claim against the debtor's estate.

The cause of action for indemnity for death of the decedent is a mere contingent claim. Upon trial there may be no recovery. As a cause of action it is too uncertain to form a basis of any claim. Only liquidation to a sum certain can give it the character of a claim.

Nor does the liability insurance policy naming Munson Steamship Line as the insured, nor the Insurance Law of New York, place Foust in the position of a secured creditor. He is not protected at all by the policy under the Insurance Law until judgment is obtained and the execution returned unsatisfied because of insolvency, and since there is no security upon property or assets of the debtor, nor upon its personal obligation of indemnity, Foust is not a secured creditor.

In re Fay Stocking Co., 10 Fed. Supp. 968 (2).

Foust, therefore, if he obtains a judgment, would then have a claim, and if such tort judgment be provable, he

had a legal right to file for such amount as was not recovered from the insurer, and if he failed to recover anything from insurer, then to file for full amount of the judgment.

Ivanhoe B. & L. Assn. v. *Orr*, 295 U. S. 243.

In the brief submitted by the debtor to this court in opposition to the Petition for Certiorari it was said at bottom of page 3:

> "Section 109 of the Insurance Law of the State of New York applies only to policies issued in the State of New York, and whether as applied to marine insurance policies it is constitutional, presents a serious question."

If that insurance law be held unconstitutional as to marine coverage then Foust would have no protection under that law and then his only chance to recover anything, except as a donee beneficiary, would be against the judgment-debtor, the Munson Steamship Line, in reorganization, and he was justified in not surrendering this right.

The court went beyond its power in attempting to make Foust waive and abandon all claim against the debtor as the price of being allowed to liquidate his claim.

POINT THREE.

The Insurance Law of New York wrote into the liability policy carried by Munson Steamship Line the provision that in the event a judgment for tort was obtained against Munson Steamship Line and returned unsatisfied because of the insolvency or bankruptcy of the insured, then the judgment-tort-creditor could recover on the policy in a direct action against the insurance company. The Circuit Court refused to lift the ban of the restraining order so that Foust could seek a judgment and thereby qualify to sue on the policy, and this was error.

Whatever may be the position generally of a mere tort claimant under Section 77B, and whether such claim or judgment be provable in reorganization, there exists a potential source of payment from the liability insurance policy which was carried by the Munson Steamship Line by complying with the New York Insurance Law requirements, to wit, obtain a judgment and have the execution thereon returned unsatisfied because of insolvency of the insured and thereupon the judgment-tort-creditor may bring suit against the insurance company. Any payment obtained from the insurance company would not diminish any of the assets of the debtor nor would the debtor have any expense of the trial.

Since the action was pending at the time the proceedings under 77B were had no good and sufficient legal reason exists to deprive this plaintiff of a common law trial and force him to chance an inadequate award from some referee who, perhaps, may be quite illiberal as to the quantum of damages or who might, because of prior training and associations, be sub-consciously prejudiced against negligence actions.

The common law action is being defended by the insurance company under its policy contract with the Munson Line. However, if the claim is heard by a referee the attorneys for the trustees in reorganization will defend and naturally will then claim fees for the extra services. Considering the number of these tort claims in suit these fees would amount to a substantial sum. Why should the bankrupt estate be charged with such fees when the insurance company is obligated to defend and is actually defending the actions?

If it be desired to conserve a bankrupt's assets for the creditors we emphasize here that large counsel fees and the expenses of trial could be saved this estate by permitting the actions to proceed regularly to trial in open court and let the insurance company bear its legitimate burden.

Why should the Munson Line, having previously protected itself against the costs, expenses and risks of trial by carrying liability insurance, assume as an insolvent debtor an obligation and burden which it would not have had to assume as a solvent insured?

Why pull the insurance company's chestnuts out of the fire at the risk of singeing its own financial fingers?

There is no reason for the trustees to diminish the estate by paying counsel fees, costs and expenses of producing the witnesses in court, stenographic fees, etc., to the detriment of general creditors when the insurance company has already been paid to defend the action at its own risk and expense.

This insurance policy is valuable to the tort claimant and may be his only possible means of collecting anything on his claim. It is a substantial property right. It is like good collateral. It is a guaranty of payment. The obtaining of the judgment cannot in any way impede, hinder or embarrass the orderly progress of the reorganization proceedings and if judgment is obtained and any effort should be made to levy it on any of the debtor's as-

sets, an injunction would properly issue to stop it. Such a levy, however, is most unlikely because the existing restraining order enjoins all sheriffs and marshalls from levying any execution on debtor's assets.

We contend that to deny such tort claimant the mere privilege and opportunity to obtain a judgment with the view to subjecting the insurance policy to the provisions of the said Insurance Law is to deny him due process of law in the protection of a valuable property right.

POINT FOUR.

Independently of Section 109 of the Insurance Law, Foust, under the general law of contracts, would be considered a donee beneficiary, for whose benefit the policy was issued and he may sue the insurer upon obtaining judgment against the Munson Steamship Line.

The respondent hints that the insurance law of New York, as it may affect maritime coverage, may be unconstitutional. If we should assume that Section 109 of the Insurance Law was non-existent, still, *under the general law* Foust would be regarded as a *donee beneficiary under that liability policy,* even though not named therein, *and he would have the right to reduce his claim to judgment and then recover on the policy,* NOT UNDER SECTION 109, but as *donee beneficiary,* or the person for whose benefit the policy was issued.

Hendrick v. *Lindsay,* 93 U. S. 143;
Austin v. *Seligman,* 18 Fed. 519-522;
Lawrence v. *Fox,* 20 N. Y. 208;
Rose v. *Zurich Ins. Co.,* 296 Pa. 206;
Graham v. *U. S. F. & G. Co.,* 308 Pa. 534;
39 Yale Law Journal 601.

See Annotations, 81 A. L. R. 1279 *et sequi.*

The insurance policy inures to the benefit of such judgment-tort-creditor because, under the law, the insurer is a guarantor, and a judgment-tort-creditor may pursue his remedy directly against the guarantor notwithstanding the reorganization proceedings.

Hill v. *Harding*, 130 U. S. 699;
Miller v. *Collins*, 40 S. W. (2d) 1062.

It would be proper practice to permit the action to proceed to judgment as a condition precedent to eventually fixing the liability under the policy, and if necessary to grant stay of execution against the assets of the debtor.

Manufacturers Finance Corp. v. *Vye-Neill Co.*, 62 Fed. (2d) 625; Cert. denied 289 U. S. 738;
Wexler v. *Davis*, 286 Mass. 142.

So that even without the benefit of the insurance law of New York, this tort claimant would be regarded as the intended beneficiary of the liability policy and, once armed with a judgment, he could sue directly on the policy. He had a common law right to fix his damages by judgment and to deprive him of that right was to deny him due process of law.

POINT FIVE.

The Circuit Court had no right to predicate its affirmance of Judge Coxe's refusal to modify the restraining order upon something not in the record.

If it be true that the policy contains a deductible clause whereby the debtor assumed the first $2,500.00 of liability, *that fact did not appear in the case when Judge Coxe refused to modify the restraining order* and *was not in the*

record on appeal considered by the Circuit Court of Appeals. It was casually mentioned *dehors* the record after the Circuit Court sought to impose terms on Foust as a condition for allowing a court trial.

The terms and conditions of the policy were never mentioned in any paper or pleading. The policy provisions were never before either the District Court or the Circuit Court of Appeals. All that the motion papers on record disclosed to either court was the bare fact that a liability policy was in existence.

Foust mentioned the $2,500 deductible *in explanation of his refusal to stipulate not to file any claim against the debtor's estate based on the judgment.*

We do not think that the Circuit Court should have put Foust in such an embarrassing position, or that he should be penalized by losing his insurance guaranty simply because he refused to enter into a stipulation deemed by him to be prejudicial and beyond his authority. He simply sought the legal right to subject that policy to the lien of his claim, and we submit that this legal question, raised on the record, should have been decided *on the record* and on its merits, divested of such *foreign considerations as deductible clauses* and *the possibility that a jury might award an excessive amount.* The court, under its rules, had no right to decide a question not passed upon by the court below.

Williams v. *Bank of America,* 55 Fed. (2d) 885 (12);
Strouse v. *Union Indemnity,* 67 Fed. (2d) 528 (8).

See:

Duignan v. *United States,* 274 U. S. 195.

That "jurors often return far larger verdicts in negligence actions than reason justifies" is no excuse for denying the valuable right of a jury trial to a seaman, particu-

larly where the presiding judge has the power to reduce verdicts, set them aside as excessive, or to grant new trials unless a reduction is voluntarily stipulated by plaintiff. If jurors are too generous, then Special Masters are often niggardly, particularly when the Special Master, by training and association, may be pro-defendant. The right to a jury trial is a very valuable right and is not lightly to be taken away.

POINT SIX.

Foust, as administrator of a deceased seaman, suing under the Jones Act, was entitled as a matter of right to a jury trial and should not have been denied that right.

The Jones Act (Title 46 U. S. C. A., Sec. 688) provides:

> "* * * and in case of death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law *with right of trial by jury*, and in such action all statutes of the United States *conferring or regulating the right of action for death in the case of railway employees shall be applicable.*" (Italics ours.)

In addition to the above provision of the Jones Act, the judicial code saves to suitors the right to a common law remedy.

Title 28 U. S. C. A., Sec. 41 (3).

It would require an emphatic and positive declaration by Congress in order to overthrow, not only the above provisions of law, but the custom and practice in respect of tort claims as so long established in equity receiverships.

It may be argued by the respondent that the inclusiveness of the language "all holders of claims of whatever

character" was intended to cover tort claims because it would be unlikely that Congress would legislate to divest a corporation of commercial and contract debts and liabilities only and have it emerge from reorganization confronted and burdened with numerous tort claims. On the contrary, we contend that Congress legislated advisedly in not disturbing the *status quo ante* of tort claims. The plight of the victims of such disasters at sea like those of the *Morro Castle* and *Vestris* was too well known to Congressmen to have them make it possible for a steamship company to defeat such tort claims, either by passenger or crew, by resort to reorganization. We cannot attribute to Congress any such intention in the absence of emphatic language in the Reorganization Act by which tort claims were included. If tort claims be included in debts and liabilities provable in reorganization, then a steamship company, faced with a major disaster and large claims arising therefrom, could effectually nullify the Jones Act and the Death on the High Seas Act by the simple expedient of reorganization. This would mean no jury trials; meager awards by Special Masters and all disputed questions of fact doubtless resolved in favor of the shipowner. We do not believe the language employed by Congress in defining "creditors" is sufficiently clear and positive to include tort claims, and thereby take away from seamen the favorable position which years of effort had given them under the Merchant Marine Act and its amendments.

Seamen are the wards of the court, and Congress has always been considerate of their rights as evidenced by the beneficent legislation in their behalf. We cannot impute to Congress an intention to take away from seamen the rights given them under the Jones Act without the use of such clear and positive language as to leave no doubt of the intention to deprive the seamen of jury trials.

Of course the right to restrain litigation is given the Court but a legal discretion must be used in exercising this power. Where there will be no interference with the

orderly procedure in reorganization, and claimants need a judgment or order to proceed against a third party, to restrain under such conditions is to be guilty of an arbitrary abuse of discretion.

The court committed an error in holding that the Reorganization Act took away this right.

POINT SEVEN.

Since the Jones Act placed seamen in the category of railroad employees, the provisions of the Railroad Reorganization Act forbidding stays of negligence suits and making tort judgments preferred claims, inure to the benefit of seamen.

Did Congress intend to discriminate between tort victims on steamships and those on railroads? Was the injured seaman to share the common fate of a merchandise creditor in corporate reorganization, while the injured railroad employee was given preferential consideration?

The Jones Act gave seamen all rights and remedies given to railroad employees under the Federal Employers' Liability Act, and amendments thereto. This court has held that the effect of the Jones Act was to place seamen in the same category as railroad employees.

> *Panama Railroad* v. *Johnson*, 264 U. S. 375;
> *Engel* v. *Davenport*, 271 U. S. 33.

If seamen are, in legal contemplation, regarded as railroad employees, why should they not come within the protection of the special consideration given railroad employees?

The Jones Act and the Employers' Liability Act are *in pari materia* and subsequent legislation affecting one will affect both.

Not only does the Railroad Reorganization Act provide that claims for personal injuries or death of an employee

"shall be preferred claims against the assets of such railroad corporation in receivership or in reorganization" (11 U. S. C. A. 205 N) but it further provides that actions for tort arising out of operations shall not be stayed, or if already stayed, the stay shall be vacated (11 U. S. C. A., Sec. 205 j).

If seamen, by virtue of the Jones Act, do not inherit the beneficent provisions of such law for railroad workers, then Congress has been guilty of most unjust discrimination between transportation employees, and if only railroad employees are protected in their tort claims, then Congress has, if 77B includes all tort claims, been guilty of a greater discrimination against the vast body of non-employee sufferers of injury or death by negligence.

If railroads have to pay tort claimants in reorganization why should steamship companies escape?

We are of the opinion that the said provisions in the Railroad Reorganization Act which prevents stay of common law actions for injuries or death of employees and which makes claims for injuries or death of employees preferred claims inure to the benefit of seamen. The Jones Act adopted the railroad law for the benefit of seamen—the railroad law then extant and any amendments thereto—and the above sections of the Railroad Reorganization Act, in effect, wrote those provisions into the railroad law, and consequently into the Jones Act.

It was contended that the provisions of the Judicial Code "saving to suitors in all cases the right to a common law remedy where the common law was competent to give it" could not be invoked under the Jones Act because it was passed subsequently to this saving clause. This contention was overruled. Said this Court:

> "The defendant insists that the saving clause refers only to rights recognized by the maritime law as existing in 1789, when the clause first was adopted, and therefore does not include rights

brought into the maritime law by subsequent legislative changes. We think the clause has a broader meaning, looks to the future as well as the past, and includes new as well as old rights, if only they are such as readily admit of assertion and enforcement in actions *in personam* according to the course of the common law. This is the view taken in *Steamboat Company* v. *Chase*, 16 Wall. 522, 523, 21 L. Ed. 369."

Panama Railroad v. *Vasquez*, 271 U. S. 557, 561.

The Federal Employers Liability Act and the Jones Act, which adopted and incorporated it, are *in pari materia* and should be construed together for the common benefit of all, and so much of the Railroad Reorganization Act as made tort claims exempt from stay and made tort claims preferred claims should apply to these two acts.

"All statutes *in pari materia* must be taken together and treated as having formed in the minds of the enacting body parts of a connected whole, though considered at different dates."

Rohrer v. *Hastings Brew. Co.*, 83 Neb. 112 (3).

"All statutes *in pari materia* are to be read together and construed together as if they formed part of the same statute, and were enacted at the same time."

Board of Commissioners v. *Aetna Ins. Co.*, 90 Fed. 222 (10).

"All acts on same subject, whenever passed, are what is termed *in pari materia*, are to be construed as if constituting one act and are to be so interpreted that all of them and all their clauses may be operative."

Scararigello v. *Pacione*, 70 Misc. (N. Y.) 211; *Elrod* v. *Moss*, 278 Fed. 124 (6).

"In cases of doubt or uncertainty acts *in pari materia* passed either before or after, and whether repealed or still in force, may be referred to in or-

der to discern the intent of the legislature in the use of particular terms or in the enactment of particular provisions."

Vane v. *Newcombe*, 132 U. S. 235;
Tiger v. *Western Inv.*, 221 U. S. 306.

So considered, the stay and preferential clauses of the reorganization act affect railroad employees under the Liability Act, and, in turn, affect seamen under the Jones Act. Therefore, another reason is presented to reverse the ruling of the Circuit Court.

"Adoption of an existing statute by an act of Legislature, which refers generally to the law relating to the subject, will include not only law in force at date of adopting act, but also such amendments of the law as are in force when action is taken or proceeding is resorted to under such law."

In re Argyle-Lake Bldg. Corp., 78 F. (2d) 491 (3).

"Generally, new enactments of fragmentary nature on subject covered by system of related general legislative provisions indicative of settled policy, should be fitted into existing system and given effect conformably thereto."

United States v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386 (1).

CONCLUSION.

The decision of the Circuit Court of Appeals for the Second Circuit should be reversed, with such direction as will vacate the stay and so modify the restraining order as to permit the Foust action to proceed expeditiously to trial.

Respectfully submitted,

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